THE CONSTITUTION OF TEXAS, 1845

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On July 4, 1845, a group of gentlemen assembled at Austin, raised the American flag over their Convention Hall, and began to frame a Constitution under which the Republic of Texas should become a state in the American Union. From time to time, in the ensuing days, their number was increased by other delegates who took their seats, and by applicants in contest for seats who presented themselves and had their hearing, until in the end there were sixty-two members to join in the completion of the Constitution. One seat they alowed to remain vacant, in recognition of loyalty and past service. General Sam Houston,[1] a delegate-elect from Montgomery County, had gone on a visit of piety and politics to the Hermitage, where Andrew Jackson departed this life on June 8, 1845.[2] Out of respect for the statesman whom most of Texas acclaimed as leader, the Convention upheld Houston in his pilgrimage, refused to declare his seat vacant even at the petition of his county, and voted to wear crepe for one month in memory of Andrew Jackson. "Texas will come into the Union almost unanimously Democratic," the Arkansas Banner, published at Little Rock, had rejoiced earlier in the spring. "It, in not many years hence, will constitute four or five States—all of which will most certainly be Democratic. . . . It is certain therefore that Whiggery is doomed . . . while the star of democracy has ascended the political horizon never to go down again, but to brighten with the waste of years."[4] The Democratic framers completed their organization by the election of General Thomas J. Rusk, of Nacogdoches, as President of the Convention, appointed seven committees, and went at once to work.

[1] *Debates of the Texas Convention*, 721, Wm. F. Weeks, Reporter. In addition to the *Debates*, published in Austin in 1845 (and hereafter cited as *Debates*), there is also *Journals of the Convention that assembled in the City of Austin on the fourth of July, 1845, for the Purpose of Framing a Constitution for the State of Texas* (Austin, 1845). C. J. Babbitt mentions both the Debates and the Journal in his admirable *Hand-List of Legislative Sessions . . . Statutory Revisions . . . and Constitutional Conventions . . .* (State Library of Mass., 1912).

[2] *New York Weekly Herald*, October 19, 1845, p. 228.

[4] Little Rock *Arkansas Banner*, April 2, 1845.

Only José Antonio Navarro, of Bexar, was Texas-born among the delegates.[5] Most of the others came from the western regions which in 1800 had been new frontiers. Tennessee contributed eighteen, more than twice the number from any other State. Virginia, with eight, Georgia, with seven, Kentucky, with six, and North Carolina, with five, came next; leaving the remaining members scattered through the Union and Great Britain. They were mostly in the prime of life, and had grown to manhood in the restless period following the second war with England. Few had resided long in Texas, and few had gained distinction elsewhere. Abner Smith Lipscomb had been chief justice in Alabama for eleven years; Hardin G. Runnels had served as governor of Mississippi. A correspondent from Austin, perhaps himself a member, wrote of them at the start: "The delegates to the Convention, for intelligence, integrity and worth, would rank high in any country. There is not, perhaps, much of brilliancy, but a great deal of matter-of-fact sense and sound knowledge; and I predict that we shall form and send you a sound and sensible Constitution, free from the worst features of ultraism."[6]

The President of the Convention, like its members, was a Democrat, and is said to have been in early life a protege of Calhoun.[7] Born in Georgia about 1803, he had practised law, moved to Texas, and become both military hero and judge before his election to the Convention. The Austin correspondent of the *Picayune* wrote of him as "highly popular, with no other objection than his excessive good-nature, which is somewhat injurious to the strict observance of order. . . . Gen. Rusk is a man of talents—not much cultivated; he is large, rather tending to fat, careless to a fault in his costume; he is kind in his manner, courteous to all. He exercises great influence over the Convention, and always for the better."[8] The debates in the Convention bear out this favorable judgment upon Rusk as a moderator and moulder of opinion.

"We have one grand object in view; and that is to enter the great American confederacy with becoming dignity and self re-

[5]Smith, Justin H., *The Annexation of Texas* (N. Y., 1911), 459.

[6]Charleston, S. C., *Courier*, July 26, 1845, quoting a New Orleans paper.

[7]James D. Lynch, *The Bench and Bar of Texas* (St. Louis, 1885), 65.

[8]Charleston, S. C., *Courier*, August 18, 1845, quoting New Orleans *Picayune.*

spect,"[9] declared Rusk in his preliminary remarks as President of the Convention. He and his colleagues, of whom twenty-five were lawyers, and four had already sat through the earlier Texas Convention of 1836, were all familiar with the workings of American state government and although delegates mentioned from time to time the provisions existing in constitutions elsewhere, they were ready to agree with Rusk that "We can reflect for ourselves and are capable of forming a Constitution for ourselves."[10] They drew most naturally upon their own Constitution of 1836, and had constantly to consider what Louisiana had recently completed in her new Constitution of 1844-1845. When the work was done the correspondent of the *Picayune,* through whom most of the contemporary news of the Convention reached the States, wrote that "its grand outline, as well as its details, is too much like the Constitutions of the old States to need elucidation."[11] And again, "In many respects it is almost a literal transcript of that of our own State, as recently completed by the Convention."[12] But towards the close of the Convention Rusk declared to his associates, "I sincerely wish that the future Constitution of Louisiana had remained up until our labors were over. We have received no benefit from it, and have come very near incorporating some articles which would have been ruinous to Texas."[13]

More than Rusk admitted, and less than the Louisianians claimed, came from the Louisiana predecessor.[14] The original Constitution of that state, framed in 1811-1812, vied with the Constitutions of Kentucky, 1799, and Virginia, 1829-1830, in their weight as precedents. But in all the western and southern states the similarity of institutions was so close, that parentage is rarely obvious. Like Hemphill, many of the delegates were "not in favor of introducing novelties in our Constitution, but wished to model it as nearly as possible upon that of the U. States."[15] It was to

[9] *Debates,* 7.

[10] *Debates,* 468.

[11] Quoted in Charleston, S. C., *Courier,* September 26, 1845.

[12] *Ibid.,* October 1, 1845.

[13] *Debates,* 468.

[14] Francis Newton Thorpe, *A Constitutional History of the American People, 1776-1850* (N. Y., 1898), I, 400-487, contains the best secondary account of this Louisiana Convention, and is based upon its *Debates* and *Journal* which the present author has not seen.

[15] *Debates,* 139.

be "as much as possible a law for the administrators of the government, and not a law for the people,"[16] said another when pressed to multiply specific provisions in the document. It resembled all its neighbors, blindly following none, and fulfilled the prediction of a writer from Galveston, in June, "that you yourself will be surprised, when you see their Constitution emanating from a people of whose disorder so much has been idly said."[17]

The constitutional skeleton which was to carry the Texas government might have originated in any state. Its *legislature*[18] consisted of a senate and a house of representatives, whose sessions were to be *biennial.* Representatives were to be chosen by the electors for a term of *two* years, and were to be *twenty-one* years of age, *citizens of the United States,* or of Texas at the time of adoption of the Constitution, with residence of *two* years in the state and *one* in the county. Senators, chosen likewise by the electors, were to have a *four* year term, and *half* of them were to retire *biennially.* They were to be thirty years of age, *citizens of the United States,* or of Texas at the time of the adoption of the Constitution, with a residence of *three* years in the state and one in the district. The electors who were to choose legislators, as well as other officers of the state, were described as *free male persons,* twenty-one years of age, *citizens of the United States,* or of Texas at the time of adoption of the Constitution, with a residence of *one* year in the state and six months in the town county or district, with a proviso that *persons in Texas at the time of adoption of the Constitution might vote upon six months residence,* and with the *exclusion of Indians not taxed, Africans and their descendants, and soldiers or seamen of the United States.*

The executive was headed by a *governor* chosen by the electors for a *two* year term, but not eligible to serve more than *four* in

[16] *Debates,* 66.

[17] Little Rock, *Arkansas Banner,* June 18, 1845.

[18] The words and phrases here given in italics are changes from the Texas Constitution of 1836. The remainder of the description applies to both constitutions. These analyses are taken from the texts as given in Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the . . . United States . . .* (7 volumes, Washington, 1909). The official copy of the Constitution of 1845 was transmitted by Anson Jones to James K. Polk, and by the latter to Congress in December, 1845, and is printed in House Executive Document 16, 29th Congress, 1st Session, Serial 482, pp. 1-28.

any *six* consecutive years. He must be *thirty* years of age, a *citizen of the United States,* or of Texas at the adoption of the Constitution, with residence of three years in the state. A *lieutenant-governor,* chosen in the same way, and under the same conditions as the governor, was to suceed in event of the death of the governor, and was meanwhile to preside over the senate, with a right to *vote and debate upon all matters, and to cast an additional* vote in case of a tie. The other executive officers were a secretary of state, to be appointed by the governor, with the consent of *two-thirds* of the senate, to hold office during the term of the governor; an attorney-general to be appointed in the same fashion for a two year term; *a state treasurer* and a *comptroller of public accounts* to be *elected for two years term by the legislature on joint ballot.*

The judiciary began with a supreme court consisting of a chief justice and *two* associate judges, to be *appointed by the governor, with the consent of two-thirds of the senate,* for terms of *six* years, to hold annual sessions, and to exercise only appellate jurisdiction *except in the case of the issuance of remedial writs.* There were also to be district courts, *inferior courts* to be created at the discretion of the legislature, and *corporation* (*municipal*) *courts.*

A comparison of this framework with the Texas Constitution of 1836 makes it clear that the Convention of 1845 adopted few new institutions from Louisiana, or in direct imitation of the federal Constitution, but followed many precedents already familiar to Texas. A few changes were the necessary consequence of the change from independence to statehood; thus the congress became a legislature, and citizenship was re-defined so as to recognize the rights of citizens of other states. Annual sessions became biennial, as did elections, and the three-year term of the former senators was lengthened to four in order to become commensurate. The other changes were matters of detail in which deliberate copying cannot be proved except through inference.

The change in residence requirements for senators, representatives, electors, and governor was in the direction of greater rigor, as was to be expected in the adoption of a final instrument of government. The Constitution of 1836 was a revolutionary document. "That convention," said Isaac Van Zandt, a lawyer from Tennessee, who had come to Texas in 1838,[19] "embraced a good

[19]*Journal,* 378.

share of wisdom and talent, but the result of their action, under the circumstances surrounding them at the time, is entitled to no great degree of consideration here."[20] Residence was of less consequence than loyalty in 1836, but in 1845 it was natural to lengthen the terms of residence for elective officers. The Louisiana precedent of 1844-1845 did not guide the Texas Convention, since it required for representatives three years of residence in the state, for senators four years, for electors two years, and for the governor fifteen years, of which, in the first three cases, one year must be spent within the parish. Texas, instead, was content to raise the term for representatives from six months to two years (with one year in the county). In this course she was identical with New Jersey, 1844, and Mississippi, 1832, but there is no evidence that she consciously followed either. She was somewhat more strict than Michigan, 1835, or Arkansas, 1836, in this, as she was in the requirements for senator. In reducing the age of representatives from twenty-five to twenty-one years, she was correcting an abnormality among constitutional provisions and conforming to type.

The secretary of state was taken over into the new Constitution with no great change, but an attempt to alter the method of choice produced a debate in Convention that gave evidence of "ultraism," present, but in check. "There is a party here, as elsewhere," wrote the *Picayune's* Austin correspondent, "that seem disposed to keep in the advance of the age, which is already sufficiently tending to ultraism."[21] As reported to the Convention by the Committee on the Executive, on July 11,[22] the secretary was to be elected by the people for a four-year term. This was changed by amendment to appointment by the governor, for the term of the governor, after a sharp debate on democracy, in which Love, of Galveston, admitted the fact, with some irony, "that we are all lovers of the people."[23] He went on with the arguments that convinced the Convention,—that the governor needed a confidential assistant, that he needed much help in his state papers, in case he should not be a scholar, that the secretary of state ought not to be elected as a spy upon his chief. In the cases of the state treasurer and

[20] *Debates*, 90.
[21] Quoted in Charleston, S. C., *Courier*, August 18, 1845.
[22] *Debates*, 24.
[23] *Ibid.*, 121.

comptroller of public accounts, the Convention again amended the Committee's report, making these officials elective by the legislature instead of by the people.

During the debate upon the skeleton the Convention discussed at length matters of general import, among which the chief topics were the word "white" as used in describing the electorate, the exclusion of the clergy from the legislature, the basis of representative districts, the creation of chancery courts with jurisdiction coextensive with that of the supreme court, and the appointment of judges. The debate on the word "white" arose when the Committee on the Legislative reported that electors should include "free white males"[24] as had been the case under the Constitution of 1836. Objection was made to this because of the doubt prevailing among some of the Texans as to the color of the Mexicans. President Rusk supported the motion to strike out "white" and to find a different means of excluding negroes and Indians not taxed from the electorate, because "It may be contended that we intend to exclude the race which we found in possession of the country when we came here. This would be injurious to those people, to ourselves, and to the magnanimous character which the Americans have ever possessed."[25] And Navarro, speaking through his interpreter, added, "that if the word *white* means anything at all it means a great deal, and if it does not mean anything at all it is entirely superfluous, as well as odious, and, if you please, ridiculous. . . . [It] is odious, captious, and redundant."[26] The word was stricken out, and the form of description of electors was made more general.

An article excluding the clergy from seats in the legislature had been adopted by Louisiana in her Constitution of 1844-1845, and was related to the Native American movement, raging when the Texas Convention met. The Texas Committee on the Legislative reported an exclusion section more sweeping than that of Louisiana, incorporating it in the legislative article instead of the bill of rights, where Louisiana had put it. The convention, perhaps again restraining the "ultraism of the age," supported the Committee in

[24] *Debates*, 53.
[25] *Ibid.*, 157.
[26] *Ibid.*, 159.

its recommendation, in spite of broad arguments against discriminations of any kind.

The basis of representative districts was and had been a vexed matter among western and southwestern states. No one of them, until Ohio, in 1851, based representation upon total population except Louisiana, in 1844-1845. But since Louisiana arbitrarily restricted the representation of New Orleans to one-eighth of the total membership of the senate, thus safeguarding the state against city influence, the force of the precedent was weakened. Texas now based her representative districts upon free population, and her senatorial districts upon qualified electors, a discrimination tending to favor the frontier counties where women, and children, and slaves were less numerous than in the older regions. The Convention followed the recommendation of the Committee on the Legislative in the case of the senate basis, but only after violent attempt had been made to change it,—an attempt that succeeded in changing the house basis from electors to free population. In the debate many different bases were suggested, ranging from total population, which would have favored the slave-holding region, to electors, which favored the frontier. The federal ratio of free persons and three-fifths of the slaves had no serious advocates, the southern community, here as elsewhere, showing no disposition to adopt for itself the condition that had been imposed upon the whole United States. The compromise as adopted was the work of a frontier rather than a plantation community. Like Baylor, the Kentuckian, many members were "against property being made the basis of representation, in any shape."[27]

In her supreme court, Texas, in 1845, changed from the system of 1836, under which a majority of the judges were district judges, sitting with the chief justice, to a court of three judges, with no district duties, with appellate jurisdiction as its main function. The Alabama practice, which embraced a separate system of chancery courts, was discussed and dismissed without adoption by the Texas Convention, because of the greater convenience resulting from placing law and equity jurisdiction in a single court. There was suggestion that the judges be made elective instead of appointive by governor and senate, but the more democratic method had little support.

[27] *Debates,* 531.

The new Texas bill of rights bears the same resemblance to the bills of rights of other states that is borne by the articles on the skeleton of government, and shows the same instances of personal preference and local adaptation. In some of the states there is a strong presumption that the bill of rights was lifted bodily from another state, polished off, and adopted. Thus the Arkansas Convention of 1835 appears to have taken the Tennessee bill of rights of 1834, condensed it severely, using only half its articles but using them in such close sequence as to make the debt apparent. There is no such process visible in the selection or arrangement of the Texas article. Here, the twenty-one sections of 1845 are obviously an expansion of the seventeen of 1836, but the sequence of ideas indicates that, beyond this, the Committee that reported the bill of rights did its own thinking and arranged its own draft.

A Committee on the General Provisions of the Constitution consisting of fifteen members, including five lawyers and six farmers, under the chairmanship of Isaac Van Zandt, was appointed when the Convention organized on July 7. Four days later the Committee reported a draft bill of rights, having "given it that investigation and deliberation which its importance seems to demand."[28] The draft contained twenty-two sections, of which two were rejected in Convention, and to which one was added before the finished article was adopted. The rejected sections included one which forbade the legislature to prohibit emigration from Texas, and one authorized the pacificist citizen to avoid military service by the payment of fees. Both were matters of occasional mention in other states. The new section guaranteed the right to bear arms.

The debates on the bill of rights indicate the temper of Texas democracy, the chief division coming over free speech and libel when sections five and six of the report were taken up. At this point Francis Moore, an editor and a member of the Committee, offered an amendment making truth a complete defense in any matter of alleged libel, the Committee recommendation having limited the proving of truth as a defence to cases involving public men and matters, and leaving other cases to court and jury. Moore and those who thought with him based their case upon the fact that the bill of rights of 1836 guaranteed that "in all prosecutions for libels the truth may be given in evidence." To this it was

[28] *Debates*, 20.

replied that numerous states used the restriction advocated by the Committee. When Moore pointed to the Mississippi Constitution of 1817 as a neighboring precedent for his view, Van Zandt was able to correct his facts and weaken the force of his argument by showing that Mississippi, in her second Constitution, 1832, had made the alteration that the Texas Committee was now recommending. The meaning of free speech was discussed at length, and the difference between liberty and license was argued in detail. It was shown that freedom to publish was not impeded by the Committee's section, that nothing was barred but the publication of the truth in malice. The oppression of citizens by scandalous newspapers was frequently alluded to; in particular those of New York City, where a reign of terror was alleged to exist, were used as horrible examples. At one stage, the Convention agreed that "in all publications injurious to female reputation, the facts thereof shall not be enquired into; but shall be deemed false and libellous."[29] The debate however continued in Committee of the Whole, and before the Convention, where the matter was repeatedly taken from the table. The movement for complete liberty died hard, but in the end it gained only a clause added to the original section, —"or where the matter published is proper for public information."[30] With this proviso, leaving the propriety of publication to court and jury, the section was adopted. As adopted, it was similar in scope and nearly identical in wording with the corresponding section of the Arkansas Constitution, 1835.

There is no clear principle of division separating the general provisions which the Committee on the General Provisions placed in the bill of rights from those, equally general, which it incorporated in Article Seventh of the Constitution under the caption "General Provisions." The significance of a bill of rights was being lost in this period, as Constitutions ceased to be descriptions of governmental machinery and became codes. The restrictive sections now often added to the Constitution in the articles on legislative or executive, might as well have been added to the bills of rights, and it is no longer possible to compare bills of rights with the intention of finding the whole body of reservations of power. Louisiana put her exclusion-of-clergy section in the bill of rights;

[29] *Debates,* 94.
[30] *Ibid.,* 303.

Texas with equal propriety put it in the article on the legislative. The Committee on General Provisions reported its two sets of restrictive sections to the Texas Convention at different times, and the ensuing debates were spread over the whole session.

There were thirty-five sections of general provisions in the original draft,[31] and thirty-seven in the final article but the amendments in detail involved the addition of eight new sections, the alteration of others, and the elimination of six. And the same Committee reported, as still different parts of the Constitution, general provisions on impeachment, slaves, and schedule.

The most instructive debates on the general provisions concerned the rights of married women, the forfeiture of property rights, the basis of taxation, and the status of corporations. The first of these was debated long, beginning with the Committee recommendation, in its section nineteen, of laws "defining the rights of married women, upon a principle of community of property between husband and wife, having a due regard for the rights of heirs and creditors."[32] In opposition to this community of property theory there were urged upon the Convention two other bases;—silence, leaving the matter to the discretion of the legislature; and specific guarantee to women of the right to retain control of their own property. The last view prevailed after the section had been referred once to the Committee on the Judiciary, and again to a Special Committee.[33] The frontier view of women's rights seems here to have triumphed over the forces of common law and conservatism.

There had been a forfeiture clause in the Texas Constitution of 1836, directed against "persons who shall leave the country" to avoid the war, or "refuse to participate in it," or "give aid or sustenance" to Mexico. A strong attempt was made to carry this provision over to the new Constitution, but its opponents pointed out that the great enlargement of Texas boundaries between 1836 and 1845 had brought into the Republic many inhabitants whose aid to Mexico was natural, and against whom confiscation ought not to be allowed to operate. A tendency to confiscate Mexican-owned territory, as well as the inevitable frontier desire for land

[31] *Debates*, 275.
[32] *Ibid.*, 277.
[33] *Ibid.*, 360, 602.

speculation, was revealed by the debate. The proposed section was defeated, but there was added to the article a new section which reenforced the security of land titles as already settled under the old Constitution, and the finality of confiscations as therein declared.

Taxation was a subject upon which Democrats were likely to have specific convictions in 1845. In the next year their new Walker tariff was based upon the *ad valorem* principle, and in the debates of the period there was much discussion of the rival methods of *ad valorem* and specific duties. The twenty-eighth section as presented by the Committee in Texas required equal, uniform, and *ad valorem* taxes upon all property that was taxed, and permitted, in addition, income and occupation taxes. The recommendation fell midway between two sets of extremists, who wanted all property to be taxed, or who wanted to leave the legislature unrestricted. The former cited the evils of special privilege, and demanded taxation based upon the amount of protection. The latter denounced inquisitorial methods, which they alleged to be inseparable from proportional taxation, and urged the handicap under which the state would labor if deprived of the right to favor new industries by exempting the capital invested in them from taxation. The Convention easily agreed to excuse farmers and mechanics from any occupation tax, and Rusk, speaking for compromise as usual, declared that "Both systems have their objections. Taxation is odious in any shape or form in which it may come."[34] As finally amended the section permitted the legislature to exempt from taxation only by a two-thirds vote in each house, and insisted that other taxation should be on the *ad valorem* basis.

In the matter of corporations, Texas in 1845, as most states between the panics of 1837 and 1857, revealed the hostilities that hard times had engendered. The chartering of banks was sweepingly forbidden, in spite of appeals for moderation and for the future. More than this, the original section on banking and corporations was expanded, forbidding any issuance of notes or paper money, and restricting private corporations to such as could secure their charters by two-thirds vote in the legislature. The Committee recommendation for a general incorporation law, although pointing toward the future, was ahead of its time and was de-

[34] *Debates,* 445.

feated. Said Rusk, in a speech that summed up the opinion of the Convention,—"I think, as a member of the Convention and the community, that it is due to myself, the country, and the people themselves, to restrain them from doing anything which would result in their injury. The gentleman from San Patricio says that many individuals have been benefited by banks. Thousands upon thousands, sir, have been ruined by them. I consider it a bright page in the history of General Jackson, that he had the honor of giving the blow which will eventually destroy them upon this continent. And I wish by no vote of mine, here or elsewhere, to authorize the institution of a bank, which may benefit a few individuals, but will carry, here as elsewhere, ruin, want, misery and degradation in its train."[35]

A thorough comparison of the debates of Texas with those of the other states that made themselves Constitutions during the later Jacksonian Period would bring out the point of view of democratic society and Democrats. In Texas, as elsewhere along the frontier, the independence and detachment of society reveal themselves. The absence of large financial interests shows itself in the simple provisions on banking and incorporation. New York in 1846, presents the reactions of an elaborately organized community in the presence of its debts and its corporations. All the Constitutions of the period show the change that was imminent, as industry swelled in magnitude and enterprises grew in size. But Texas was still a frontier,—not so much a frontier as in 1836, not entirely under the influence of the pioneer, not completely given over to the "ultraism of the age," but none the less youthful, confident of its capacity, and progressive in its views.

[35] *Debates*, 461.